AmBank (M) Bhd v Pang Tee Chiang @ Phang Nyiok Pan and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–1503 OF 2009 AND W–02–1590 OF 2009
ZAINUN ALI, RAMLY ALI AND ZAHARAH IBRAHIM JJCA
6 APRIL 2011

Hire Purchase — Breach of agreement — Claim by hirer against owner — Car supposed to be new but registration card containing endorsement it was imported used car — Car seized by Customs Department for investigation for one year and later returned to owner — Hirer refusing to pay installments — Whether seizure of car amounted to violation of implied warranty of quiet possession under s 7(1)(a) of the Hire-Purchase Act 1967 — Whether misrepresentation and breach of warranty and condition by owner — Whether rendered hire purchase agreement void — Whether hirer entitled to refund of deposit

Hire Purchase — Breach of agreement — Claim by owner against hirer — Hirer defaulting in payment of deposit and installments — Car supposed to be new car but registration card containing endorsement it was imported used car — Car seized by Customs Department for investigation for one year and later returned to owner — Hirer refusing to pay installments — Whether hirer liable to pay shortfall after auction of car

Hire Purchase — Breach of agreement — Claim by owner against guarantor — Hirer defaulting in payment of deposit and installments — Whether s 22 of the Hire Purchase Act 1967 applicable — Whether guarantor signed hire purchase agreement as principal hirer — Whether guarantee agreement valid and enforceable

This case revolved around the hire purchase of a motorcar ('the vehicle'). On 24 July 1999, Ace Active Trade (M) Sdn Bhd ('the dealer') sold the vehicle to Trade Ocean Exporters Sdn Bhd ('the hirer') at a purchase price of RM988,700. The hirer had entered into a hire purchase agreement on 24 July 1999 with AmBank (M) Bhd ('the owner'). A deposit of RM289,250 was payable. The hirer paid RM68,000. Cheques for the balance sum were issued twice but on both occasions, the cheques bounced. The agreement specified that the vehicle being hired was 'One Unit New Mercedes Benz W220 S320L'. One Pang Tee Chiang ('the guarantor') had guaranteed the payment of the installments by the hirer to the owner. The hirer defaulted the first two installments and a Fourth Schedule notice of intention to repossess was issued on 25 September 1999.

Five days later the hirer received the registration card of the said vehicle and found the endorsement on the card that the vehicle was an imported used car. The hirer then refused to pay the installments. On 5 November 1999 the said vehicle was seized by the Royal Customs and Excise Department for investigation. About one year later, the Customs Department returned the said vehicle to the owner as their investigation disclosed no offence had been committed. The owner took back the vehicle from the Customs Department and issued the Fifth Schedule notice to the hirer and the guarantor. There was no response from the hirer and the guarantor. The vehicle was subsequently auctioned to a third party for RM545,000, leaving a shortfall of RM380.548.07. The hirer filed a claim against the owner for misrepresentation and breach of warranty and condition by the owner resulting in the said hire purchase agreement being void and thus claimed for refund of the deposit paid to the dealer. The owner filed a counterclaim against the hirer for the shortfall outstanding under the said hire purchase agreement after disposal of the said vehicle. The hirer's claim was dismissed and the owner's counterclaim was allowed by the High Court. The owner's claim against the guarantor for the shortfall outstanding under the said hire purchase agreement was dismissed. The learned judge held that the guarantee signed by the guarantor was void for non-compliance with s 22 of the Hire Purchase Act 1967 ('Act'). Hence, these appeals. The hirer submitted that the seizure of the vehicle by the Customs Department amounted to a violation of the implied warranty of quiet possession of the vehicle as provided for under s 7(1)(a) of the Act.

Held, allowing Appeal No W–02–1503 of 2009 with costs and dismissing Appeal No W–02–1590 of 2009 with costs:

(1) The owner and/or the dealer had not misrepresented to the hirer regarding whether the said vehicle was new or secondhand. There being no misrepresentation, the balance of the deposit which had not been paid by the hirer was therefore due to the dealer (see paras 9(a) & 13).

(2) The deprivation was caused by the Customs Department and not by the owner; therefore the owner was not liable for violation of the implied warranty (see paras 15–16).

(3) Section 22 of the Act was not applicable to the facts of the present case. Section 22 does not apply to cases where the guarantor besides being an ordinary guarantor to the transaction, also declares to undertake responsibilities or obligations of the principal debtor or principal hirer. The guarantor in this case had signed the agreement not as a mere guarantor but also as a principal hirer. Hence, the requirement that the guarantee agreement must be signed by the guarantor in the presence of a magistrate, a commissioner for oath or a notary public as stipulated

under s 22 of the Act was not applicable to the facts of the present case. The guarantee agreement was thus valid and enforceable (see paras 21 & 26).

[Bahasa Malaysia summary

Kes ini berkisarkan sewa beli sebuah kereta ('kenderaan tersebut'). Pada 24 Julai 1999, Ace Active Trade (M) Sdn Bhd ('wakil penjual') telah menjual kenderaan tersebut kepada Trade Ocean Exporters Sdn Bhd ('penyewa') pada harga belian RM988,700. Penyewa itu telah memasuki perjanjian sewa beli pada 24 Julai 1999 dengan AmBank (M) Bhd ('pemilik'). Deposit sejumlah RM289,250 perlu dibayar. Penyewa telah membayar RM68,000. Cek-cek untuk jumlah baki itu telah dikeluarkan dua kali tetapi pada kedua-dua kali itu, cek-cek tersebut tidak diterima. Perjanjian itu menetapkan bahawa kenderaan tersebut yang disewa adalah 'One Unit New Mercedes Benz W220 S320L'. One Pang Tee Chiang ('penjamin') telah menjamin bayaran ansuran oleh penyewa kepada pemilik. Penyewa telah gagal membuat dua ansuran pertama dan notis niat Jadual ke-4 untuk mengambil balik telah dikeluarkan pada 25 September 1999. Lima hari kemudian penyewa telah menerima kad pendaftaran kenderaan tersebut dan mendapati pengindorsan pada kad itu yang kenderaan tersebut adalah kereta terpakai yang diimport. Berikutan itu penyewa enggan membayar ansuran-ansuran tersebut. Pada 5 November 1999 kenderaan tersebut telah dirampas oleh Jabatan Kastam dan Eksais Diraja untuk siasatan. Lebih kurang satu tahun kemudian, Jabatan Kastam telah mengembalikan kenderaan tersebut kepada pemilik kerana siasatan mereka mendapati tiada kesalahan telah dilakukan. Pemilik telah mengambil balik kenderaan tersebut daripada Jabatan Kastam dan telah mengeluarkan notis jadual ke-5 kepada penyewa dan penjamin. Tiada jawapan daripada penyewaan dan penjamin. Kenderaan tersebut kemudian telah dilelong kepada pihak ketiga untuk RM545,000, meninggalkan baki RM380.548.07. Penyewa telah memfailkan tuntutan terhadap pemilik kerana telah memberi salah nyataan dan pelanggaran waranti dan syarat yang mengakibatkan perjanjian sewa beli itu terbatal dan oleh itu telah menuntut bayaran balik deposit yang telah dibayar kepada wakil penjual. Pemilik telah memfailkan tuntutan balas terhadap penyewa kerana baki yang belum dibayar di bawah perjanjian sewa beli itu setelah kenderaan itu dijual. Tuntutan penyewa telah ditolak dan tuntutan balas pemilik telah dibenarkan oleh Mahkamah Tinggi. Tuntutan pemilik terhadap penjamin kerana baki yang belum dibayar di bawah perjanjian sewa beli itu telah ditolak. Hakim yang bijaksana telah memutuskan bahawa jaminan yang ditandatangani oleh penjamin adalah terbatal keran ketidakpatuhan s 22 Akta Sewa-Beli 1967 ('Akta tersebut'). Justeru itu, rayuan-rayuan tersebut. Penyewa berhujah bahawa rampasan kenderaan tersebut oleh Jabatan Kastam membentuk pelanggaran waranti tersirat milikan ke atas kenderaan tersebut sebagaimana diperuntukkan di bawah s 7(1)(a) Akta tersebut.

Diputuskan, membenarkan Rayuan No W–02–1503 Tahun 2009 dengan kos dan menolak Rayuan No W–02–1590 Tahun 2009 dengan kos:

(1) Pemilik dan/atau wakil penjual tersebut tidak salah nyata kepada penyewa berkaitan sama ada kenderaan tersebut adalah baru atau terpakai. Tiada salah nyataan, maka baki deposit yang belum dibayar oleh penyewa dengan itu perlu dibayar kepada wakil penjual (lihat perenggan 9(a) & 13).

(2) Kilanan telah disebabkan oleh Jabatan Kastam dan bukan pemilik, oleh itu pemilik tidak bertanggungjawab kerana melanggar waranti yang tersirat (lihat perenggan 15–16).

(3) Seksyen 22 Akta tersebut tidak terpakai kepada fakta kes ini. Seksyen 22 tidak terpakai untuk kes-kes di mana penjamin selain daripada merupakan penjamin biasa dalam transaksi, juga menyatakan untuk mengambil tanggungjawab atau obligasi penghutang utama atau penyewa utama. Penjamin dalam kes ini telah menandatangani perjanjian bukan sebagai penjamin semata-mata tetapi juga sebagai penyewa utama. Justeru itu, keperluan agar perjanjian jaminan hendaklah ditandatangani oleh penjamin dengan kehadiran majistret, pesuruhjaya kehakiman atau notari awam sebagaimana ditetapkan di bawah s 22 Akta tersebut tidak berkuat kuasa (lihat perenggan 21 & 26).]

Notes

For cases on breach of agreement generally, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4438–4483.

For cases on claim against guarantor, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4448–4451.

Legislation referred to

Hire-Purchase Act 1967 ss 7(1)(a), 22

Appeal from: Suit Nos D7–22–183 of 2000, D7–22–210 of 2002 and D7(D4)–22–1149 of 2000 (High Court, Kuala Lumpur)

Hargopal Singh (Hargopal Singh & Co) in Appeal No W-02–1503 of 2009 for the appellant.

Mureli Navaratnam (Mureli Navaratnam) in Appeal No W-02–1503 of 2009 for the respondent.

Mureli Navaratnam (Mureli Navaratnam) in Appeal No W-02–1590 of 2009 for the appellant.

Hargopal Singh (Hargopal Singh & Co) in Appeal No W-02–1590 of 2009 for the respondent.

Ramly Ali JCA (delivering judgment of the court):

[1] There are two appeals before this court heard together, namely:

(a) Appeal No W-02–1503 of 2009:
an appeal by AmBank (M) Bhd, as the owner of the vehicle in question against an individual, Pang Tee Chiang @ Phang Nyiok Pan, as the guarantor to the hire purchase transaction, against the decision of the Kuala Lumpur High Court in Civil Suit No D7–22–210 of 2002 in dismissing the owner's claim with no order as to costs; and

(b) Appeal No W-02–1590 of 2009:
an appeal by the hirer of the said vehicle, Trade Ocean Exporters Sdn Bhd against AmBank (M) Bhd, as the owner, and Ace Active Trade (M) Sdn Bhd, as the dealer against the decision of the Kuala Lumpur High Court in Civil Suit No D7–22–183 of 2000 which dismissed the hirer's claim against the owner and allowed the owner's counterclaim against the hirer.

BRIEF FACTS

[2] The facts in this case revolve around the hire purchase of a motorcar, Mercedes Benz W220 S320L bearing registration No WGY 911. On 24 July 1999, the dealer sold the vehicle to the hirer at a purchase price of RM988,700. The hirer had entered into a hire purchase agreement on 24 July 1999 for 60 months commencing from 24 August 1999 at a monthly installment of RM15,750. A deposit of RM289,250 was paid. The hire purchase was therefore for a sum of RM700,000 with an interest of RM245,000 making it RM1,234,250 in total (including the deposit). The agreement specifies that the vehicle being hired is 'One Unit New Mercedes Benz W220 S320L'.

[3] The guarantor had by a guarantee dated 24 July 1999 guaranteed the payment of the installments by the hirer to the owner.

[4] The hirer defaulted the first two installments (due on 24 August 1999 and 24 September 1999) and a Forth Schedule notice of intention to repossess was issued on 25 September 1999. Five days later (on 30 September 1999) the hirer received the registration card of the said vehicle and found the endorsement on the card that the vehicle was an imported used car (*kenderaan import terpakai*). The hirer then refused to pay the installments.

[5] On 5 November 1999 the said vehicle was seized by the Royal Customs and Excise Department for investigation. On 9 December 2000 (slightly more

than one year later) the Customs Department returned the said vehicle to the owner as their investigation disclosed no offence has been committed with regard to the said car.

[6] The owner took back the vehicle from the Customs Department and on 13 December 2000 issued the Fifth Schedule notice to the hirer and the guarantor. There was no response from the hirer and the guarantor. The vehicle was subsequently auctioned to a third party on 5 December 2001 for a price of RM545,000, leaving a shortfall of RM380,548.07 as at 11 March 2002.

[7] The hirer filed a claim against the owner vide Civil Suit No D7–22–183 of 2000 for misrepresentation and breach of warranty and condition by the owner resulting in the said hire purchase agreement being void and thus a claim for refund of the alleged deposit of RM289,250 paid to the dealer. The owner on the other hand filed its counterclaim against the hirer for the shortfall outstanding under the said hire purchase agreement after disposal of the said vehicle at RM380,548.07. The hirer's claim was dismissed and the owner's counterclaim was allowed by the Kuala Lumpur High Court.

[8] In the other case, (Civil Suit No D7–22–210 of 2002) the owner had filed a claim against the guarantor under the guarantee agreement date 24 July 1999 for the shortfall outstanding under the said hire purchase agreement after disposal of the said vehicle at RM380,548.07. This claim was dismissed by the court.

[9] At the trial at the High Court, all parties agreed that there are only three issues to be tried, as follows:

(a) whether the owner and/or the dealer misrepresented to the hirer that the said vehicle was new or secondhand;

(b) whether the hirer had complied with the terms of payment of the deposit of RM289,250 to the dealer; and

(c) what is the effect of the seizure of the said vehicle by the Royal Malaysian Customs and Excise Department.

[10] On the first issue — the learned High Court judge found in favour of the owner that the owner and/or the dealer had not misrepresented to the hirer on the status of the said vehicle. At paras 7.9, 7.10 and 7.11 of her grounds of judgment the learned judge ruled:

> 7.9 However, that is immaterial on the facts of this case. Even though the vehicle was not new, there was no misrepresentation. From the particulars recorded in the registration card dated 16 July 1999, it appears that the parties, in particular, the hirer, were well aware of the fact that the vehicle in question was an imported

used car from the outset. There are two endorsements on the registration card. One pertains to the fact that the vehicle was an imported used car while the other refers to the claim by the owner. The signature of the hirer also appears on the registration card. Since there are no other dates appearing on the registration card, it is reasonable for me to conclude the endorsements and the hirer's signature must have been affixed on the registration card at or around the same date of registration on 16 July 1999.

7.10 The evidence also show that the hirer had been in default of payment even before the registration card was forwarded to the hirer. Although the hirer made protestations on the status of the vehicle upon receipt of the registration card, it is obvious that the refusal to pay had nothing to do with the status of the vehicle.

7.11 In the circumstances, regardless of what was held out on the documentation, it is evident on the facts that the hirer accepted that an imported used car was new. It would have been beneficial if evidence was led as to the difference in value between a brand new and an imported used Mercedes Benz W220. S320L But since there is none, I can only find that the hirer entered into the arrangements with the respective parties on the terms as appearing in the relevant documentation.

[11] This court is in full agreement with the learned judge's finding on this issue and decides not to interfere with it.

[12] On the second issue: this issue is relevant between the hirer and the dealer. The amount due as deposit is RM289,250. The hirer paid RM68,000. Cheques for the balance sum were issued twice but on both occasions, the cheques bounced.

[13] Again on this issue, this court is in agreement with the learned judge's finding that these sums have not been paid by the hirer and there being no misrepresentation, these sums are therefore due to the dealer. This finding is clearly not in favour of the hirer.

[14] The third issue is on the effect of the seizure of the vehicle by the Royal Malaysian Customs and Excise. In this regard, the Customs Department seized the vehicle from the hirer on 5 November 1999. Subsequently on 9 December 2000, the Customs Department returned the vehicle to the owner. A notice under the Fifth Schedule was then issued by the owner to the hirer and guarantor on 14 December 2000 giving the hirer the option of taking back the vehicle by settling the installments that were in arrears or to purchase the vehicle by paying the full balance outstanding. This option was offered several times, but neither the hirer nor the guarantor responded.

[15] The hirer submitted that by reason of the seizure of the vehicle by the

Customs Department, there was a violation of the implied warranty of quiet possession of the vehicle as provided for under s 7(1)(a) of the Hire-Purchase Act 1967.

[16] On this issue also, the learned judge found in favour of the owner ie on the facts of this case, it is clear that the deprivation was caused by the Customs Department and not by the owner; therefore the owner is not liable for the violation of the implied warranty. On this issue the learned judge concluded that 'in the circumstances, the basis of the claim of the Hirer is not sustainable'. This court agrees with this finding.

[17] Apparently the learned judge's finding on all the three agreed issues were not in favour of the Hirer as well as the guarantor. However, the learned judge went on to consider another issue raised by the guarantor ie whether the guarantee signed by Pang Tee Chiang @ Phang Nyiok Pan as the guarantor on 24 July 1999 is void pursuant to s 22 of the Hire-Purchase Act 1967. The learned judge found that the guarantee agreement is void for non compliance with s 22 and on this ground alone the owner's claim against the guarantor in Civil Suit No D7–22–210 of 2002 was dismissed.

[18] Section 22 of the Hire-Purchase Act 1967, provides as follows:

> Where a guarantor of a performance of the obligations of the hirer under a hire purchase agreement enters into an agreement binding the guarantor:
>
> (a) to pay to the owner an aggregate sum which is larger than the balance originally payable under the agreement; or
>
> (b) to perform an obligation in respect of goods other than the goods comprised in the hire purchase agreement,
>
> the agreement so entered shall be void unless the agreement is executed by the guarantor in the presence of a Magistrate, a Commissioner for Oaths or a Notary Public.

[19] The guarantor contended that, cl 4 of the guarantee agreement imposes further and other liabilities on the guarantor, that is the liability to 'further indemnity the Owner against all actions, proceedings, claims and demands whatsoever made by the Hirer arising out of any alleged warranty and/or representation or otherwise in respect of the goods'. To the guarantor, this would mean that the sum the guarantor may ultimately be liable for would exceed the sum due from the hirer, in which case, the guarantee agreement must be witnessed by either a magistrate, a commissioner for oaths or a notary public as envisaged by s 22.

[20] The learned judge agreed with the guarantor and found that the said guarantee agreement was void and therefore the owner's claim against the guarantor was dismissed.

[21] This court is of the view that s 22 of the Hire-Purchase Act 1967 is not applicable to the facts of the present case. Section 22 applies to 'a guarantor of a performance of the obligations of the Hirer under the hire purchase agreement' ie the guarantor entered into the guarantee agreement 'as a guarantor'. It does not apply to cases where the guarantor besides being an ordinary guarantor to the transaction, also declares to undertake responsibilities or obligations of the principal debtor or principal hirer (in this case). The guarantor in this case signed the agreement not as a mere guarantor but also as a principal hirer.

[22] Clause 3 of the guarantee agreement provides as follows:

> I/We hereby agree and confirm that all sums of moneys which may not be recoverable from me/us as guarantor by reason of any legal limitation, disability or incapacity on or of the Hirer, including (without limitation) any defect, informality or deficiency, in the powers of the Hirer to enter in the Hire Purchase Agreement or in the exercise of such powers which might be a defence between the Hirer and yourselves shall nevertheless be recoverable from me/us as if I/We had entered into the Hire Purchase Agreement with yourselves in place of the Hirer.

[23] Clause 11 of the hire purchase agreement provides as follows:

> In the event that you take legal proceedings against me (the Hirer) in any matter arising out of or in connection with this Agreement, I agree to fully indemnify you against all legal expenses incurred by you in such proceedings on a full solicitors and client basis.

[24] The undertakings by the guarantor under cl 4 of the guarantee agreement correspond with the undertakings by the hirer under cl 11 of the hire purchase agreement. Subject to cl 3 of the guarantee agreement, the undertakings of the hirer become the undertakings of the guarantor, not as a guarantor per se but as a principal hirer 'as if he had entered into the hire Purchase Agreement with the Owner in place of the Hirer'. Under cl 18 of the guarantee agreement, the guarantor acknowledged and declared that:

> I/We hereby expressly acknowledge and declare that I/We are fully aware of all the provisions of the Hire Purchase Agreement and this Guarantee and fully understand the contents and effects thereof.

[25] The guarantor clearly understood the contents of the respective

agreements when he signed the guarantee agreement on 24 July 1999; he did so voluntarily and with open eyes, fully appreciative of the consequences of such an undertaking.

[26] On the above reasoning, this court held that the requirement that the guarantee agreement must be signed by the guarantor in the presence of a magistrate, a commissioner for oath or a notary public as stipulated under s 22 of the Hire-Purchase Act 1967 is not applicable to the facts of the present case. Therefore, the said guarantee agreement dated 24 July 1999 is valid and enforceable.

CONCLUSION

[27] On the above considerations, this court unanimously makes the following orders:

(a) in respect of Appeal No W-02–1503 of 2009:
the appeal is allowed with costs of RM5,000 to the appellant (as agreed); and

(b) in respect of Appeal No W-02–1590 of 2009:
the appeal is dismissed with costs of RM5,000 to the respondent (as agreed).

Appeal No W-02–1503 of 2009 allowed with costs; Appeal No W-02–1590 of 2009 dismissed with costs.

Reported by Kanesh Sundrum